

Mohammed Harid Vs District Collector**W.P. (C) No. 6599 and 2005 and connected cases**

Court: High Court Of Kerala**Date of Decision:** March 7, 2014**Acts Referred:**

Constitution of India, 1950 â€” Article 226#Income Tax Act, 1961 â€” Section 179#Kerala General Sales Tax Act, 1963 â€” Section 26B, 26C

Citation: (2014) 3 ILR 200 : (2014) 2 KHC 257 : (2014) 2 KLT 102**Hon'ble Judges:** Antony Dominic, J; Anil K. Narendran, J**Bench:** Division Bench**Advocate:** Mohammed Rafiq and Shaiju Antony, Advocate for the Appellant; S. Sudheesh Kumar, Government Pleader, Advocate for the Respondent

Judgement

Antony Dominic, J.

The petitioners in these Writ Petitions, the appellants in W.A. No. 1995/12 and the party respondents in W.A. No.

956/2013 were Directors of Private Limited Companies incorporated under the provisions of the Companies Act, 1956. Such companies were

assesseees under the K.G.S.T. Act and were being assessed accordingly. By S. 3 of the Kerala Finance Act 1999 (Act 23 of 1999), S. 26C was

introduced to the Kerala General Sales Tax Act with effect from 1.4.1999. This Section reads thus:

26C. Liability of Directors of a Private Company.-Subject to the provisions of the Companies Act 1956 (Central Act I of 1956) where any tax or

other amount recoverable under this Act from any private company, whether existing or wound up or under liquidation, cannot be recovered for

any reason whatsoever, every person who was a director of such company at any time during the period for which the tax or other amount is due

under this Act shall be jointly and severally liable for the payment of such tax or other amount.

Relying on the provisions of S. 26C, revenue recovery proceedings were initiated against the petitioners in the Writ Petitions, the appellant in W.A.

No. 1995/12 and the party respondents in W.A. No. 956/2013 for recovery of the sales tax due from the Private Companies of which they were

Directors in relation to assessment years prior to 1.4.1999. Aggrieved by such recovery proceedings, Writ Petitions were filed before this Court.

2. When the petitioner in W.P.(C) No. 6599/2005 pressed into service the judgment of this Court in *Kassim v. Sales Tax Officer* (2007 (4) KLT

538), where it was held that S. 26C being a prospective legislation, cannot affect rights and liabilities in respect of any assessment year prior to

1.4.1999, doubting the correctness of the same, by order dated 1.8.2012, a learned Single Judge referred the Writ Petition to be considered by a

Division Bench of this Court. In so far as W.A. No. 1995/12 is concerned, though the contention of retrospectivity was also urged, the learned

Single Judge dismissed the Writ Petition holding that, on facts, the petitioner therein did not deserve any relief in exercise of the discretionary

jurisdiction under Article 226 of the Constitution of India.

3. In so far as W.A. No. 956/2013 is concerned, following the judgment in *Kassim's* case (supra), the plea of retrospectivity was accepted by a

learned Single Judge of this Court and on that basis the Writ Petition was allowed, which judgment is challenged in this appeal. It is in this

background, these Writ Petitions and appeals are coming up for consideration before this Court.

4. We heard the learned counsel appearing for the parties and the learned Government Pleader appearing for the official respondents and the

State.

5. The first contention raised by the learned counsel appearing for the parties was that S. 26C being prospective, tax due for any period prior to

01.04.1999, could not have been recovered by taking recourse to this provision. Though it is true that the said contention has been accepted in

Kassim's case (supra), having regard to the fact that the said judgment has been doubted and the matter is referred for reconsideration,

examination of the issue of retrospectivity of section should start from the language in which the Legislature has chosen to frame S. 26C.

6. We have already extracted S. 26C in the earlier part of this judgment and it is the admitted case of all parties that S. 26C came into the statute

with effect from 1.4.1999.

7. Reading of this provision shows that the Section comprises of the following parts;

1. that it is subject to the provisions of the Companies Act, 1956.

2. that tax or other amount recoverable under the K.G.S.T. Act is due from a Private Company.

3. that such company may be existing, wound up or is under liquidation.

4. that the tax or other amount cannot be recovered for any reason whatsoever.

8. This Section further provides that, if all the above conditions are satisfied, every person who was a director of such company at any time during

the period for which the tax or other amount is due under the K.G.S.T. Act shall be jointly and severally liable for the payment of such tax or other

amount.

9. Therefore, S. 26C will be applicable for recovering the tax or other amount due under the K.G.S.T. Act from a Company either existing, wound

up or is under liquidation and if the other ingredients of the section are also satisfied, every person who was a Director of such company at the time

when the amount became due, shall be jointly and severally liable. This therefore means that under S. 26C, a Director, who was in office when the

amount became due, is made liable for amount due from the company and such liability could have been incurred by the Company any time prior

to 1.4.1999 also and if such liability is remaining outstanding and is not recoverable for any reason as stated in the Section, the Directors who were

then in office are jointly and severally liable. The above elements of the Section would show that though this provision was introduced w.e.f.

1.4.1999, it applies for recovery of the liabilities incurred by the company prior to 1.4.1999 also.

10. We also notice that by S. 2A, a similar provision was introduced to the Karnataka Sales Tax Act, 1957 by Act No. 23 of 1983, providing

that where any firm is liable to pay any tax or penalty or any other amount under the Act, the firm and each of the partners of the firm shall be

jointly and severally liable for such payment. S. 2A came up for consideration of the Apex Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh

and Co. and Others, . That was a case where the firm was in arrears of the tax due for the assessment years 1958-1959 to 1964-65 and 1967-68

to 1969-70. While the liability stood outstanding, properties of the partners were mortgaged to the appellant bank. Based on the mortgage, the

Bank filed the suit and when the suit was pending, relying on S. 2A introduced by Act 23 of 1983, revenue recovery proceedings were initiated for

recovering the tax due for the aforesaid years and the mortgaged properties were sold and were purchased by the State. Thereupon, the State was

impleaded as a party to the suit and upholding the right of the Bank as a mortgagee, the suit was decreed in its favour. Appeal filed before the High

Court was allowed in favour of the State and the Bank challenged the High Court judgment before the Apex Court.

11. The contention of the Bank that S. 2A introduced in 1983 was not retrospective was considered by the Apex Court in paragraph 16 and 17

where it was held thus;

16. The learned counsel for the appellant submitted that sub-section (2-A) of S. 15 of Karnataka Sales Tax Act could not be given a retrospective

operation. This submission is misconceived. A legislation may be made to commence from a back date, i.e. from a date previous to the date of its

enactment. To make a law governing a past period on a subject is retrospectivity. A Legislature is competent to enact such a law. The ordinary

rule is that a legislative enactment comes into operation only on its enactment. Retrospectivity is not to be inferred unless expressed or necessarily

implied in the legislation, specially those dealing with substantive rights and obligations. It is a misnomer to say that sub-section (2-A) of S. 15 of

the Karnataka Sales Tax Act is being given retrospective operation. Determining the obligation of the partners to pay the tax assessed against the

firm by making them personally liable is not the same thing as giving the amendment a retrospective operation. In Principles of Statutory

Interpretation (by Justice G.P. Singh, Seventh Edition, 1999, at page 369), it is stated:-

The rule against retrospective construction is not applicable to a Statute merely ""because a part of the requisites for its action is drawn from a time

antecedent to its passing."" If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its

operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefore, not retrospective merely because

it applies also to those to whom pre-amended Act was applicable if the amended Act has operation from the date of its amendment and not from

an anterior date.

17. There is, therefore no question of sub-section (2-A) of S. 15 of the Karnataka Sales Tax Act being given a retrospective operation. It is

prospective. However, it does not make any difference for the facts of the present case.

12. In Dena Bank's case (supra), the Apex Court also relied on its previous judgment in Third Income Tax Officer, Circle-I, Salem and Another

Vs. Arunagiri Chettiar, and held thus in paragraph 20 and 21.

20. A provision similar to the one included in S. 18 of the Bombay Sales Tax Act has been incorporated in the Karnataka Sales Tax Act as

referred to hereinabove and that is why the partners of the borrower firm in the case before us cannot take shelter behind the law laid down by this

Court in Commissioner of Sales Tax, Madhya Pradesh, Indore and Others Vs. Radhakrishnan and Others, . Here we may also refer to a two-judge

Bench decision of this Court in Third Income Tax Officer, Circle-I, Salem and Another Vs. Arunagiri Chettiar, in which provisions of S. 188A,

income tax Act, 1971 have been noticed. S. 188A declares a partner and his legal representatives jointly and severally liable along with the firm to

pay any tax, penalty or sum payable for the year in which he was a partner. It was observed that S. 188A explicitly provides what was implicit

hitherto. In the case at hand the partners are being held liable by reason of S. 15(2A) of the Karnataka Sales Tax Act, 1957.

21. The learned counsel for the appellant is right in submitting that on the day on which the State of Karnataka proceeded to attach and sell the

property of the partners of the firm mortgaged with the Bank, it could not have appropriated the sale proceeds to sales tax arrears payable by the

firm and defeating the Bank's security in view of the law as laid down by this Court in Commissioner of Sales Tax, Madhya Pradesh, Indore and

Others Vs. Radhakrishnan and Others, . However, still in the facts and circumstances of the case, the appellant Bank cannot be allowed any relief.

S. 15(2-A) of Karnataka Sales Tax Act had come into force on 18.12.1983 while the decree in favour of the Bank was passed on 3.8.1992 and

is yet to be executed. The claim of the appellant Bank is still outstanding. Even if we were to set aside the sale held by the State, it will merely

revive the arrears outstanding on account of sales tax to which further interest and penalty shall have to be added. The amended S. 15(2-A) of the

Karnataka Sales Tax Act shall apply. The State shall have a preferential right to recover its dues over the rights of the appellant-Bank and the

property of the partners shall also be liable to be proceeded against. No useful purpose would therefore, be served by allowing the appeal which

will only further complicate the controversy.

13. Still later, in its judgment in State of Madhya Pradesh and Another Vs. State Bank of Indore and Others, , the applicability of S. 33C of the

M.P. General Sales Tax Act, 1958, which was introduced with effect from 19.01.1976 and providing that notwithstanding anything to the contrary

contained in any law for the time being in force, any amount of tax and/or penalty, if any, payable by a dealer or other person under the Act shall

be a first charge on the property of the dealer or such person was considered. In that judgment, the Apex Court held thus:

5. Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in

favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the bank in respect of

the loan taken by the second respondent. There is no question of retrospectively here, as, on the date when it was introduced, S. 33-C operated in

respect of all charges that were then in force and gave sales tax dues precedence over them. This position in law is discussed in detail in the

judgment of this Court in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, .

14. In the light of the above principles laid down by the Apex Court, we cannot accept the contention of the learned counsel for the parties that the

S. 26C of the K.G.S.T. Act cannot be taken advantage of by the State to recover amounts due to it for the periods prior to 1.4.1999.

15. In so far as the judgment in Kassim"s case (supra) is concerned, in paragraph 4 of the judgment, it has been held thus:

4. By the Amending Act 23 of 1999, S. 26B was introduced making the tax payable under the Act to be first charge on the property of the dealer

or of any other person, who would be liable to pay tax, penalty or interest or any other amount under the Act. S. 26C extended such liability to

such persons, who were the Directors of a private company, which would be liable under the Act, in the event of tax or other amount becoming

beyond recovery from the company. A reading of S. 26C would show that the joint and several liability is fastened on every person who was a

Director of such company at any time during the period for which the tax or other amount is due under the Act. The period for which tax or other

amount becomes due is nothing but the assessment years. Therefore, S. 26C, which is not retrospective in operation because of the simple reason

that it is a provision that authorises recovery, can be invoked only for fastening joint and several liability for tax or other amounts that may be due

under the Act for any period after the insertion of S. 26C into the Act, that is, on or after 1.4.1999.

16. A reading of the above paragraph shows that the learned Judge concluded the issue without adverting to the language used by the Legislature,

which, in our view, expressly clarifies its intention that it applies to transactions prior to 01.04.1999 also. The relevant binding precedents, including

those referred to above also have not been referred or relied on in this judgment. Therefore, we are constrained to hold that the judgment does not

lay down the correct principle of law.

17. Learned counsel for the parties also relied on the judgment of a Division Bench of this Court in Ratanlall Murarka and Others Vs. Income Tax

Officer, ""A"" Ward and Others, . That was a case where the Division Bench of this Court had considered the impact of S. 179 of the Income Tax

Act, which read thus:

Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), when any private company is wound up after the commencement of

this Act, and any tax assessed on the company, whether before or in the course of or after its liquidation, in respect of any income of any previous

year cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be

jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect,

misfeasance or breach of duty on his part in relation to the affairs of the company.

The contention of retrospectivity was considered and the Division Bench held thus:

Section 179 is a new provision introduced in the Act in the sense that there was no corresponding provision in the Indian I.T. Act, 1922. It

imposes a vicarious liability upon the directors in respect of the tax arrears of the companies, although the companies themselves are entities

independent of the directors. The liability is linked to the income of the previous year which has been assessed to tax. From its very scheme the

section is prospective and there is nothing in its wording that would attract its provisions to the previous year before the commencement of the Act

on April 1, 1962. The previous years relative to the assessment years 1959-60 and 1960-61 are far prior to the commencement of the Act and

are clearly outside the sweep of S. 179. The petitioner"s contention that he could not be saddled with the tax liability of the company for these two

years, by resorting to S. 179, is thus well founded and has to be sustained.

18. Reading of the judgment shows that the Division Bench proceeded on the assumption that there is nothing in the wording of the Section

indicating that its provisions would be attracted to the previous years prior to the commencement of the Act on 1.4.1962. In our view, that

conclusion of the Division Bench is contrary to the express language of the Section, which says that where tax of any previous year cannot be

recovered, every person who was a director at any time during the relevant previous year shall be jointly and severally liable. Further, the

interpretation given to S. 179 of the Income Tax Act is also against the principles laid down by the Apex Court in Dena Bank's case (supra) and

State Bank of Indore's case (supra)

19. It was then contended by the learned counsel for the parties that S. 26C of the K.G.S.T. Act, which was brought into the statute w.e.f. 1.4.99

created new obligations on the Director of a Private company and that itself is a good ground to hold that the Section is prospective in nature and

that obligations thereunder are also in relation to assessment years subsequent to 1.4.99. In support of this principle, learned counsel relied on the

judgment in Plewa v. Chief Adjudication Officer (1995 (1) Appeal Cases 249). Although it is true that a reading of the judgment relied on by the

counsel would indicate that the contention similar to the one urged was accepted in that case, still, this Court cannot brush aside the binding

precedents laid down by the Apex Court and prefer precedents from abroad. As we have already indicated, if the principles laid down by the

Apex Court in Dena Bank's case (supra) and State of Madhya Pradesh's case (supra) are followed, the inevitable conclusion that is possible is

that though the Section by itself is not retrospective, any liability for tax or other amount due under the K.G.S.T. Act remaining outstanding as on

1.4.99 is liable to be recovered taking recourse to S. 26C of the Act. The legal effect of S. 26C being as above, we cannot import the principles

laid down in Plewa's case (supra) and conclude the issue in favour of the parties.

20. Learned counsel for the petitioner in W.P.(C) No. 6599/05 contended that proceedings under S. 65 of the Revenue Recovery Act were

initiated against him without even issuing a notice under S. 34 of the said Act. It is true that proceedings under S. 65 should be preceded by

proceedings under S. 34 of the Revenue Recovery Act and such a view has been taken by this Court in Muralidharan v. State of Kerala (1995 (2)

KLT 176). Similarly, learned counsel for the appellant in W.A. No. 1995/12 contended that though S. 26C authorises recovery from a Director

only if the amount is otherwise not recoverable from the company, recovery proceedings were initiated against him despite the availability of assets

with the company itself. We also note that such a contention was accepted by a Division Bench of this Court in Jose Kurian, Jose Cyriac and P.C.

Roy Vs. The Deputy Tahsildar (RR), The Sales Tax Officer and The State of Kerala . These contentions have nothing to do with the validity of

Section and are factual in nature. In our view, such contentions are always available to the affected parties and when proceedings are initiated

against them, it is for them to urge those contentions in the objections which they are entitled to file against the proceedings initiated. Therefore, we

refrain from dealing with those contentions and leave it open to the parties concerned to agitate those issues before the concerned authorities at the

appropriate stage.

21. It was then contended by the learned counsel for the petitioners that though S. 26C itself opens by stating that the said provision is subject to

the provisions of the Companies Act, respondents are proceeding against the Directors of the Private Companies ignoring the statutory provisions

of the Companies Act dealing with the liabilities of the Director of a Private Company. Reading of S. 26C itself show that the said provision is

subject to the provisions of the Companies Act and that even the respondents did not have a case otherwise. Therefore, State and its authorities

cannot proceed against the Directors of the Company as if S. 26C contains a non obstante clause entitling them to ignore the provisions of the

Companies Act. Here again, we feel that if any statutory right or protection available to a Director under the Companies Act is contravened by the

proceedings initiated by the respondents in enforcement of their right under S. 26C, it is always open to the Director concerned to contest the

matter in the objections to be filed by them. Therefore, we clarify the position as above and leave the issue at that, with liberty to the party

concerned to agitate the matter at the appropriate stage.

22. In the light of the above discussions, W.P.(C) No. 6599/05, 13634/05 and 1282/07 are disposed of. W.A. No. 956/13 filed by the State

against the judgment in W.P.(C) No. 14565/12 will stand allowed. In so far as W.A. No. 1995/12 is concerned, that is filed by the petitioner in

W.P.(C) No. 4403/07. Being the Director of a Private Company by name Raghul and Constructions Private Limited, Calcutta, an assessee under

the K.G.S.T. Act, proceedings under S. 26C were initiated against the appellant. Such proceedings were challenged and on the dismissal of the

Writ Petition, the Writ Appeal was filed. A reading of the judgment itself shows that the reason for the dismissal of the Writ Petition was that in

view of the previous conduct of the appellant, the learned Judge found that it was not a fit case for the exercise of discretionary jurisdiction and to

intercept the sale proceedings held on 19.9.07 and confirmed on 21.2.2008.

A reading of the judgment shows that against the assessment against the appellant he had filed W.P.(C) No. 31038/04. It is also seen that the

conditions imposed by this Court for staying the revenue recovery proceedings were not complied with by the appellant and that in the meanwhile,

the revenue recovery sale that was conducted also was confirmed. Thereupon, W.P.(C) No. 4403/07 was filed, in which also, the conditional

interim order passed was not complied with. It was in such circumstances that the learned Judge held that the recovery proceedings in question

cannot be interfered with as the appellant did not merit relief under discretionary jurisdiction. This conclusion of the learned Judge, in the facts of

this case, is perfectly justified and we therefore do not find any reason to interfere with the judgment under appeal. W.A. No. 1995/12 will,

therefore, stand dismissed.